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FISCAL IMPACT REPORT

ORIGINAL DATE 2/06/07
 LAST UPDATED 2/15/07 HB _____

SPONSOR Griego

SHORT TITLE Contract Management Act SB 769/aSJC

ANALYST Patel

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	\$250.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Attorney General (AG)
- Office of the State Auditor (OSA)
- Department of Finance and Administration (DFA)
- General Services Department (GSD)
- Energy, Minerals and Natural Resources Department (EMNRD)
- Office of the Chief Information Officer (OCIO)
- Regulation and Licensing Department (RLD)
- Department of Labor (DOL)
- Department of Health (DOH)
- Public Safety Department (PSD)
- Higher Education Department (HED)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment inserts “the judicial and legislative branches and any” on page 4, line 5 of the bill.

The SJC amendment would exempt the judicial and legislative branches from review for approval of contracts equal to or greater than \$1 million by the office of the attorney general to eliminate “separation of powers” issues.

Synopsis of Original Bill

Senate Bill 769 would create the Contract Management Act and establishes procedures for managing professional and consulting services contracts. The bill requires agencies to prepare an objective evaluation of state resources prior to making a decision to contract. Evaluation methodology shall consider whether the skill exist within the agency to provide the services, whether the services would duplicate those already provided elsewhere and whether there are deadlines the agency may not be able to meet.

An agency’s Administrative Services Division, General Counsel and Secretary shall review the decision to contract, request for proposal process and before entering into any contract the agency must certify to DFA they have complied with the determination of contract need and the agency review process.

For contract over \$1 million, the agency must develop specific guidelines for administration and implementation of the contract. All contracts equal to or greater than \$1 million, except for those of public post-secondary educational institutions, shall be reviewed for approval by the office of the attorney general.

For contracts under \$1 million, agencies must use DFA guidelines that shall include

- documentation to support the contract solicitation and selection process;
- policies and procedures to ensure that contractors do not provide services until a fully executed contract is in place;
- cost effective methods to track performance and deliverables; and
- filling of contracts and related documentation.

Unless exempted, contracts over \$300.0 shall be a performance contract including performance measures, accountability reporting provisions and monitoring requirements. DFA is to provide guidelines on developing performance specifications. All contracts equal to or greater than \$300.0 shall be reviewed for approval by the state budget division of the DFA. The bill requires DFA to create an agency schedule to ensure all agencies are in compliance with the Contract Management Act by end of fiscal year 2009.

The bill requires contracts for specific services when applicable to include a warranty provision and a provision allowing the agency to retain at least twenty (20) percent of the value of deliverables as security for full performance under the terms of the contract.

FISCAL IMPLICATIONS

Senate Bill 769 appropriates \$250,000 from the general fund to the Department of Finance and Administration for recurring expenditure in fiscal year 2008 for three full-time employees to implement the provisions of the Contract Management Act. Any unexpended or unencumbered balance remaining at the end of fiscal year 2008 shall revert to the general fund.

According to the Department of Finance and Administration “since agencies currently have little or no training in true performance contracting, all to them would require extensive training. In fact, some persons currently processing contracts in some agencies might not even be able to qualify to do such work.... Agencies could require new personnel to implement all these changes.” DFA also indicated that the DFA would have to be trained before it could train other

agencies. All of this training would carry a significant cost.

According to the General Services Department “If current practices don’t include needs assessment and performance contract measurements, these requirements could increase agency focus on contractor performance and could lead to more cost-effective solutions. For agencies currently deficient in these areas, requiring this kind of control could ultimately result in an overall cost savings.”

SIGNIFICANT ISSUES

According to the Attorney General’s Office “the bill exempts professional and consulting services agreements of the legislative and judicial branches, and post education institutions providing for compensation of \$1 million or over from review by the Department of Finance and Administration. However, the bill only exempts those contracts of post-secondary institutions from review and approval of the Office of the Attorney General, implying that office must still review such contracts entered into by the legislative and judiciary branches of government. This review could raise “separation of powers” issues.”

According to the General Services Department “Agencies would have to identify contract deliverables and define a contract’s scope of work in terms of results required, which could increase accountability and cost effectiveness.”

The Department of Finance and Administration raises the following significant issues:

- 1) A cost/benefits analysis is a costly and time-consuming process and oftentimes would cost more than any actual contract (especially those on the lower end of the \$300,000 scale). Further, the legislation mandates that such an analysis be performed in accordance with the Federal Office of Management and Budget's guidelines which exceed some 20 pages and is only a small portion of the OMB's guidebook on this subject. Currently, the Governor has put guidelines into place which call for agencies to review and assess whether a contract can be done internally and whether the contract is truly necessary.
- 2) The bill calls for an internal review by various persons in each agency (ASD Directors, legal counsel and Secretary). Such review should already be occurring in agencies. DFA's Rule on contracts specifically calls for legal sufficiency review at the agency level. Further, only those with signature authority (generally the Secretary of an agency or designee such as a Deputy Secretary, ASD Director, etc.) can bind any agency to a contract. One would presume that such persons would "substantively review" the papers they are signing.
- 3) The bill mandates that contracts of \$1,000,000 or more should have specific guidelines for implementation above and beyond the agencies' regular guidelines and DFA's guidelines. This would entail three layers of bureaucracy for a single contract. Such a duplication of efforts appears to be wasteful on its face.
- 4) The legislation calls for contracts below \$1,000,000 to be governed by internal agency guidelines "or similar guidelines" (presumably those written by DFA?). This, too, should already be happening at the agency level in accordance with the DFA rule and policies and procedures.

5) The bill mandates that all contracts of \$1,000,000 or more be reviewed and approved by the AGO. There are several problems with this. First of all, such review adds no value to the contracts since legal counsel at the agencies are already required to sign the same contract. Secondly, in keeping with the DFA rule requiring agency signatures for legal sufficiency, many agencies have had to hire attorneys for this and other work. Thirdly, why the arbitrary sum of \$1,000,000 (it used to be \$200,000)? Fourthly, in the past, when a similar policy was in place for contracts of \$200,000 or more, the AGO's review caused significant delays in processing of agency contracts. A two week waiting period, at minimum, had to be factored into the turnaround time for any contract that had to be reviewed by the AGO. Further, the AGO balked at "approving" contracts and would not sign the contracts but only attach a memo certifying that the contract had been reviewed. Finally, there may be a separation of powers issue if the AGO is "approving" contracts from the legislative or judicial branches.

6) The amount is not as significant as the type of contract when dealing with performance contracts. This is nowhere taken into consideration in this legislation.

7) Pursuant to DFA's rule NMAC 2.40.2, most of what is contained in this legislation (legal review by agency, proper signature (and presumably, therefore) review by agency heads, performance measures tied to agencies' strategic plans or missions) is already in place through regulation. If the Rule needs to be tweaked to add more details on contract management processes, etc., then this should come via a rule change; no legislation is required for such changes.

8) The legislation calls for review by DFA's Budget Division for any contract over \$300,000. It is unlikely that the Budget Division would have the resources currently to perform such reviews. And the bill makes no appropriation for funds to assist the Budget Division of DFA with adding these resources.

9) "Selectively monitor contract procedures and projects in agencies." This, basically, is calling for the Department of Finance and Administration to perform an audit function. Currently, this is beyond the statutory power of DFA. Under Section 13-1-118 NMSA 1978, "All contracts for professional services with state agencies shall be reviewed as to form, legal sufficiency and budget requirements [.]" Performing contract audits within agencies is clearly not mandated by this statutory language. Therefore, at present, DFA could not legally conform with the mandates of SB-769.

10) The bill calls for DFA to provide training to agencies to write and manage such performance contracts. The first problem with this is, as stated, the need for DFA personnel to receive training themselves in such contracts. The second problem is that, even with such training, the issues with moving toward full-out performance-based contracting are such that the Federal government is still having difficulty with such contracting, even with all the Federal resources available to implement this idea. A report done nine years after such contracting was instituted at the Federal level showed that agencies still were not performing such contracting well or even properly, in some instances (see GAO-02-1049).

11) Such a radical implementation as this bill calls for would make it appear that current contracting practices in the State are somehow failing. Yet, no report has been issued which clearly shows whether agencies have not received the value for which they have contracted under current processes. In fact, no such study has even been made. Certainly, there are always going

to be contracts which fail. But are the majority of the State's contracts failing so thoroughly that such a radical overhaul should be considered? Where is the cost/benefits analysis that justifies such a change?

PERFORMANCE IMPLICATIONS

The Attorney General will be required to devote staff time and resources to reviewing contracts for the specified services having compensation amounts of \$1 million or more.

According to DFA “there are a great many performance implications under this legislation both at the agency level and at the level of the Department of Finance and Administration. New and more personnel required, training, new policies, increasing the level of red tape (three levels of guidelines/policies in some contracting situations), etc.”

According to the Energy, Mineral and Natural Resources Department “EMNRD already has in place and follows a well-established contracts review policy that requires measurable deliverables and includes guidelines about procurement documentation and policies and procedures to ensure services are not provided until a fully executed contract is in place. There will be additional responsibilities placed on agency personnel in addition to their daily work, to monitor the performance measures reported by the contractor during the execution of the contract. The exact impact of this is unknown since the level of performance measures would probably vary from contract to contract.”

ADMINISTRATIVE IMPLICATIONS

According to the General Services Department additional resources might be needed to track performance measures not previously required. The amount of time for agencies to go from identification of need to completing contracts for services might increase. If a detailed needs assessment is not presently required, additional resources might be needed.

The Office of the Chief Information Officer (OCIO) indicated that a contract review process is in place that is performance based. There are published rules and policies from the OCIO that require deliverables based contracts, warranties, retain age and performance bonds, when appropriate.

TECHNICAL ISSUES

According to DFA “it is questionable, given the current statutory authority of the Department of Finance and Administration, whether the Department can even meet the mandates of this bill. The current state of the law would seem to prohibit much of this legislation’s requirements upon DFA (see under significant issues #9).

ALTERNATIVES

According to DFA “make what changes are required and possible in contracting process under NMAC 2.40.2 instead of instituting new and duplicative legislation for which there is no evidenced need.”